this data, the Commission's only reasonable course of action is to dismiss Verizon's Petitions on the ground that Verizon has failed to sustain its burden of proof.

Importantly, Verizon should not **be** permitted to use the *exparte* process to game this proceeding. Verizon's petitions should be evaluated and judged by the Commission as they were presented by Verizon at the time of filing. After all, Verizon in its sole discretion determined the timing of its filings and the nature and extent of supporting data to include with its Petitions. If Verizon is permitted to offer additional empirical data through the *ex parte* process, parties with a critical interest in the outcome **of** this proceeding, and the Commission itself, will be forced to evaluate and respond to a moving target, and likely will not have a full and fair opportunity to address the new information.[62] As stated in the *Omaha Forbearance Order,* the Commission is under no obligation to evaluate a forbearance petition "otherwise than as pled."[63] Accordingly, the Commission should consider Verizon's Petitions as filed and, after doing so, dismiss them for failure to sustain their burden of proof.

IV. VERIZON'S PETITIONS SHOULD BE DENIED ON THE MERITS BECAUSE VERIZON HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE FROM STATUTORY UNBUNDLING REQUIREMENTS

In the event that the Commission does not dismiss Verizon's Petitions, the Commission should deny Verizon forbearance from section 251(c)(3)'s unbundling requirements. The burden of proof to justify forbearance clearly falls upon Verizon as the

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62 Allowing Verizon to submit more granular empirical evidence at this point in time (or in the future) would he highly prejudicial. Six months, representing one-half of the statutory period provided for evaluation of the forbearance requests, have passed since the Petitions were filed. Rather than allow Verizon to submit more granular information at this point – should Verizon seek to avoid dismissal through such a ploy – the Commission should dismiss the Petitions and allow Verizon to refile with more granular data, starting the twelve-month statutory clock anew.

63 *Omaha Forbearance Order,* n. 161

petitioning party,[64] and to meet the first two prongs of section 10(a), Verizon must prove that enforcement of section 251(c)(3) is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement of section 251(c)(3) is not necessary for the protection of consumers.[65] Verizon, for all practical purposes, has made no attempt to demonstrate that sufficient competition exists in the relevant markets to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory and that enforcement of section 251(c)(3) and the other provisions it requests forbearance from are not necessary for the protection of consumers, as required by Section 10(a).

Importantly, Verizon fails to present its analysis in terms of the relevant geographic markets that were used in the *Triennial Review Remand Order* unbundling analysis and in the Omaha and Anchorage forbearance proceedings, *i.e.* the wire center. Verizon also fails to address the appropriate product markets. It is *not* the burden of either the Commission or other interested parties to extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the hodgepodge of anecdotes and general information Verizon provided with its Petitions in an attempt to conduct the careful analysis Verizon chose not to undertake. Verizon has the burden of demonstrating that sufficient facilities-based competition *for each relevant product market* exists *in the relevant geographic market* before forbearance can be approved for network elements used to serve *that product market in that geographic marker.* There is no short-cut available to Verizon, as the Commission made clear in the *Omaha Forbearunce Order.* There, the Commission granted forbearance in only nine of the 24 wire

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64 *See* Section II, *supru.*

65 47 U.S.C. § 160(a).

centers in the Omaha MSA.[66] Similarly, in the more recent Anchorage decision, the Commission granted forbearance to the incumbent in only five of the carrier's 11 wire centers.[67]

Verizon – not opponents or the Commission – must be required to disaggregate the evidence it has assembled in support of its Petitions and present the data for each product market in each geographic market before its forbearance requests can be entertained. In the absence of such disaggregated evidence, Verizon cannot sustain its burden of proof that section 251(c)(3) unbundling is not needed to protect consumers and to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory.

A. Verizon's Analysis Inappropriately Ignores the Relevant Geographic Markets

In each of *its* Petitions, Verizon treats the entire MSA as !he relevant geographic market.[68] By this, Verizon appears to be suggesting that competition is ubiquitously sufficient throughout each **MSA** to justify forbearance and that no more-granular analysis is required. The ***Omaha Forbearance Order*** and the ***Anchorage Forbearance Order*** make it impossible to accept this contention without substantial proof. Both of those decisions considered section 251(c)(3) forbearance on a wire-center-by-wire-center basis, in conformity with the Commission's ***Triennial Review Remand*** *Order*.[69] Verizon has made no effort to justify a deviation from these earlier decisions. Indeed, Verizon nowhere addresses why it believes the MSA is the appropriate geographic market notwithstanding this well-established precedent. The only way for Verizon to

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66 ***Omaha Forbearance Order,*** ¶ 61.

67 ***Anchorage Forbearance Order,*** ¶ 2

68 ***See*** Verizon Petition - Boston, at 2, 4;Verizon Petition – New York, at 2, 4; Verizon Petition – Philadelphia, at 2, 4; Verizon Petition –Pittsburgh, at 1-2, 4; Verizon Petition – Providence, at 2, 4;Verizon Petition – Virginia Beach, at 2-4. Importantly, as discussed below, Verizon often blurs the distinction between the mass market and the enterprise market in order to support its argument that forbearance is appropriate in both markets.

69 ***Triennial Review Remand Order,*** ¶¶ 155-56

substantiate its claims for forbearance is to conduct the very wire-center-by-wire-center analysis which it steadfastly avoids.

B. Verizon Fails to Show Sufficient Facilities-Based Competition Exists In Any Relevant Product Market For Any Wire Center

Verizon attempts to evade a wire-center-by-wire-center analysis by providing a litany of anecdotes regarding actual or would-be competitors that are or "soon" will be providing competition in some percentage of the territory or to a certain fraction of the end users within the MSA.[70] Verizon offers MSA-wide, state-wide, and even national information to support its Petitions, but such information is worthless to complete the sort of market-specific analysis required by section 10. Central to its effort, Verizon recites the names of many cable-based, wireless, Voice over Internet Protocol ("VoIP"), and CLEC providers purportedly offering competing services.[71] But upon examination, Verizon fails to meet its burden of proof because the information it provides does not further a meaningful wire center-based analysis.

Verizon has utterly failed to show that these various providers represent a sufficient measure of facilities-based competition for the purpose of the Commission's forbearance analysis. It is uniformly unclear the extent to which any of these entities actually compete with Verizon in the relevant geographic markets (*i.e.*, wire centers) *today* because Vcrizon has not attempted to make such a showing. Further, to the extent there is some actual

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70 *See, e.g.,* Verizon Petition - Boston, at 5 ("Comcast also has said it plans to market its voice service to 80 percent of its nationwide footprint by the end of 2006."). **See** *also* Verizon Petition – Philadelphia, at *5;* Verizon Petition – Pittsburgh, at 4; Verizon Petition – Providence, at 5.

71 ***See,*** *e.g.,* Verizon Petition - Boston, at 22 ("Such competitors include traditional telecom carriers such as AT&T, Level 3, Sprint, Global Crossing, PAETEC, Broadwing, and One Communications; managed service providers and systems integrators such as IBM, Electronic Data Systems Corp. Accenture, Northrop Grumman, and Lockheed Martin, and equipment vendors such as Lucent and Nortel."). ***See*** *also* Verizon Petition – New York, at 23; Verizon Petition – Philadelphia, at 23; Verizon Petition – Pittsburgh, at 21; Verizon Petition – Providence, at 21; Verizon Petition – Virginia Beach, at 21.

competition in some wire centers, Verizon is silent regarding the extent to which these entities are providing service using their own facilities without dependence upon the very UNEs for which it seeks forbearance. In the *Omaha Forbearance Order,* the Commission found it crucial that the primary competitor to Qwest "has been successfully providing local exchange and exchange access services in [the wire centers in which the Commission granted forbearance] *without relying on Qwest's loops and transport.*"[72]

Similarly, in the *Anchorage Forbearance Order,* the Commission found the extent to which ACS's competitor, GCI, has constructed last-mile facilities to he highly relevant to its forbearance analysis and limited its grant of forbearance to "those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)."[73] The Commission in the *Anchorage Forbearance Order* reiterated:

> Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.[74]

Yet in its Petitions, Verizon provides no evidence regarding the extent to which section 251(c)(3) UNEs or other Vcrizon wholesale facilities are relied upon by the competitors it claims support its forbearance requests. This absence of data cannot be overlooked and demonstrates Verizon's failure to meet it burden of proof.

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72 *Omaha Forbearance Order,* ¶ 64 (emphasis supplied).

73 *Anchorage Forbearance Order,* ¶ 21.

74 *Id.*, ¶ 23.

The Commission has made clear in previous forbearance cases that the mere *potential* for competition does not justify the grant of forbearance. While the potential for competition may be a factor, a threshold of *actual* facilities-based competition is required.[75] In the *Omaha Forbearance Order,* the Commission concluded that although "Coverage Share"[76] is relevant to a section 251(c)(3) forbearance determination, a "Retail Market Share" test must be met and competition in the wholesale market must be analyzed before forbearance in any wire center is appropriate." The Commission expressed this point clearly when it stated

> While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the **MSA,** . . . the criteria for section 10(a) are not satisfied in all of Qwest's territory in this MSA. The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act arc protected. . .
>
> * * *
>
> We tailor Qwest's relief to specific thresholds of facilities-based competition from Cox."[78]

Moreover, as noted above, this competition must be through a carrier's own facilities, not reliant upon the incumbent local exchange carrier's ("ILEC's") facilities. In the *Omaha Forbearance Order,* the Commission stated emphatically that

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75 *Omaha Forbearance Order,* ¶ 62

76 Coverage Share, as employed in the *Omaha Forbearance Order,* refers to whether a competing carrier "is willing and able within a commercially reasonable time'' to provide service in each relevant product market to customers served by a specific wire center within the footprint of the ILEC. ***Id.,*** ¶¶ 62, 69 (granting Qwest forbearance in the mass market in those Omaha wire centers where **Cox's** voice-enabled cable plant covers at least **[REDACTED]** percent of the end user locations in that wire center).

77 The Retail Market Share test employed in the *Omaha Forbearance Order* refers to the number of local end users *actually* served by a competing carrier, or the percentage of the retail local exchange market *captured* by a competing carrier in *each* relevant product and geographic market. ***Id.,*** ¶ 66 (examining the number of voice customers Cox has obtained). *See also id.,* ¶ 67 (discussing the role of the wholesale market).

78 *Id.. ¶¶* 61-62.

> Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.[79]

Further, Commission precedent requires that Verizon provide evidence of actual facilities-based competition in wholesale as well as retail markets. Since Verizon seeks forbearance from the section 251(c)(3) unbundling obligation for wholesale services, the Commission's analysis must consider the effects that a grant of forbearance would have on consumers of wholesale services as well as consumers of retail services. And, as the Commission correctly noted in the *Anchorage Forbearance Order,* "[c]ompetition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market (*e.g.*, DSO and high-capacity loops)." Verizon has not attempted to make the required showing.[80]

Finally, data showing declines in Verizon's residential switched access lines and business lines provide no evidence of the actual facilities-based competition that is a prerequisite to section 251(c)(3) forbearance relief. In support of its Petitions, Verizon cites decreases (between 2000 and 2005) in its retail residential switched access lines and its business lines, contending that these line losses show that "various competitive alternatives are widely used in the [ ] MSA."[81] In reality, these figures show nothing regarding the state of competition in these MSAs. The Commission recognized this in the *Anchorage Forbearance Order* where it

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79 *Id.*, ¶ 60.

80 *Anchorage Forbearance Order,* n. *82.*

81 Verizon Petition – Boston, at 2. *See also* Verizon Petition – New York, at 2; Verizon Petition – Philadelphia, at 2; Verizon Petition – Pittsburgh, at 2; Verizon Petition – Providence, at 2; Verizon Petition – Virginia Beach, at 2.

"reject[ed] ACS's contention that the sheer fact of its line loss compels forbearance."[82] As the Commission correctly noted in the *Anchorage Forbearance Order,* line loss by an ILEC "does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."[83] It also may indicate that the consumer has abandoned its wireline voice service in favor of a wireless offering. Before Verizon can argue that line loss data should be included in the Commission's forbearance analysis, it must show that decreases in its line counts are not attributable to consumers moving from one Verizon product to another Verizon service offering.[84] Verizon has offered no such evidence here.

As further shown below, Verizon has failed to provide sufficient evidence of the actual wholesale or retail facilities-based competition that is the absolute prerequisite to a finding that the consumer protection requirements of section 10(a) have been met and the grant of forbearance for any wire center in any of the six MSAs identified in its Petitions is justified. This fatal shortcoming is not surprising in light of existing evidence that the markets at issue are highly concentrated. In New **York** State, for example, the Department of Public Service Staff ("NYS Staff') concluded, in the context of the Verizon-MCI merger proceeding, that pre-merger, the mass market in New **York** was "highly concentrated" and that the merger of Verizon

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82 *Anchorage Forbearance Order,* n. 88

83 *Id.*

84 *See Verizon's 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband and Business Markets* (Jan. 29, *2007) available at* **http://investor.verizon.com/news/view.aspx?NewsID=83** (claiming Verizon Wireless is the nation's leading wireless carrier in terms of revenue and number of retail subscribers).

and MCI would significantly increase that concentration by more than an acceptable threshold.[85] Similarly, NYS Staff found that "[t]he merger of Verizon and MCI present[ed] significant market concentration issues in the medium and large business, voice and data markets . . ."[86] More recently, Verizon withdrew its request for further deregulation of its retail business services in New York in the face of evidence showing Verizon's dominance in those services.[87]

1. Cable Competition

Verizon's principal foundational basis in each Petition is the presence of cable competitors in the relevant **MSA.** Although various cable companies may have upgraded their cable plant to provide cable-based telephony and thus may provide some measure of facilities-based competition in each MSA, the Verizon Petitions simply fail to heed the unequivocal mandate from the Commission regarding the necessity for a wire-center-by-wire-center analysis of the presence of facilities-based competition. Instead, Verizon relies upon insufficient and MSA-wide representations of competition by cable providers generally, making it largely impossible to ascertain the extent of actual competition in any of the myriad wire centers in the six markets at issue.[88]

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85 ***See Department of Public Service Staff White Paper, ("NYS Staff White Paper"),*** Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission (Jul. 6, 2005), at 25.

86 ***Id.*** at 26-27.

87 ***See A Critical Examination of the Verizon Report: Understanding the Level of Business Competition in New York,*** attached to the Joint Comments of COMPTEL, Cordia Communications, Covad Communications, InfoHighway Communications, Smart Choice Communications, Transbeam, and XO Communications, Case No. 064-0897, New York Public Service Commission (filed Sept. 25, 2006).

88 ***See, e.g.,*** Verizon Petition – New York, at 4-5 (discussing cable competition in the MSA). ***See also*** Verizon Petition – Philadelphia, at 4-5; Verizon Petition – Pittsburgh, at 4-5; Verizon Petition – Providence, at 4-5; Verizon Petition – Virginia Beach, at 4-5; Verizon Petition – Boston, at 4-5.

a. Mass Market

Verizon focuses heavily on E911 listings for residential customers of cable providers to show that cable providers offer voice services throughout their entire franchise areas and as a proxy for voice competition from cable providers in **the** overall mass market.[89] This approach is woefully deficient for several reasons. First, nowhere does Verizon identify the degree of competition in any particular wire center. Instead, Verizon focuses simplistically on the overall number of wire centers in the **MSA** in which cable competitors serve residential customers, which is a far cry from demonstrating the retail market share (or coverage potential) of any competitor *within* these wire centers. For example, in New **York,** Verizon notes that "cable companies in the New York **MSA** collectively provide voice service to residential customers in wire centers that account for **[redacted]** percent of Verizon's residential access lines in the MSA."[90] Verizon says nothing regarding the actual share of any cable company within any given wire center. This generalized information does not account for different cable providers "covering" different areas within each **MSA** nor does it recognize that different cable providers possess different penetration levels within each **MSA.**

Further, Verizon's E911 data is only for a subset of the mass market; Verizon proffers no E911 listings for small business customers.[91] There is no basis to conclude, as does

89 As discussed in Section III.B, *supra*, Verizon's reliance on E911 data is unauthorized and inappropriate, and should not be permitted by the Commission.

90 Verizon Petition – New York, at 4-5.

91 *See* Verizon Petition – New York, at 6 (discussing cable competition in the **MSA).** See *also* Verizon Petition – Boston, at 6; Verizon Petition – Philadelphia, at 6; Verizon Petition – Pittsburgh, at 6; Verizon Petition – Providence, at 5; Verizon Petition – Virginia Beach, at 5-6.

Verizon,[92] that inclusion ***of*** small business data would demonstrate an *increased* state of competition for mass market customers. It is well documented that cable companies have generally achieved less market share for small business customers than they have for residential subscribers.[93] Consequently, if small businesses were factored into the competitive equation, cable companies' overall mass market share likely would he ***smaller.***

Verizon has also failed to demonstrate the number of wire centers in which the cable companies offer voice service to residential customers using their own upgraded facilities. **As** explained above, it is the degree of *facilities-based* competition that is of prime importance in a forbearance analysis. Without such data, the presence of secondary factors, such as competitors that rely on Verizon's wholesale alternatives to provide retail services in competition with Verizon, must be presumed. Such secondary factors likely result in significantly weaker competitive environments which cannot justify forbearance." Before the Commission can rely upon Verizon's claims regarding cable Competition for mass market telephony services, Verizon must adequately demonstrate (1) that cable providers do not rely materially on section 251(c)(3) UNEs or other Verizon wholesale facilities in the various wire centers;[95] and (2) that each cable

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92 *See, e.g.*, Verizon Petition – New York, at 6 ("these data [concerning the percentage of wire centers in which cable companies collectively provide service] likely understate the extent of competition for mass market customers as **a** whole"). *See also* Verizon Petition – Philadelphia, at 6; Verizon Petition – Pittsburgh, at 6; Verizon Petition – Providence, at 5; Verizon Petition – Virginia Beach, at 5; Verizon Petition – Boston, at 6.

97 *See, e.g.*, **http://www.cable360.net/ct/voice/20147.html.**

94 Exhibit 1 to the Lew/Verses/Garzillo Declaration, which shows the prices of retail services, is not particularly germane to consideration of whether the Commission should continue to obligate Verizon to provide key elements to the provision of retail services by competitors. There is no way to ascertain the extent to which the retail services listed in the Lew/Verses/Garzillo Declaration are being provided by competitors using their own facilities.

95 Verizon sidesteps the issue of whether the cable providers at issue are ubiquitously present within their franchise areas. Nor does Verizon demonstrate that, for each wire

. . .*Continued*

provider upon which Verizon relies is substantially present in each wire center with its own plant, including facilities and nodes technically able to provide voice-grade services.

Tellingly, Verizon reaches even beyond MSA-wide data in an effort to provide support for its requests. In an attempt to demonstrate how cable operators are growing in the relevant MSAs, Verizon offers *nationwide* projections of growth.[96] These projections prove nothing about the geographic coverage or the potential for subscriber or market share increases for telephony within the specific MSAs at issue, let alone within the relevant geographic markets (*i.e.*, wire centers) within those MSAs. The Commission should completely disregard such aggregate data.

At bottom, Verizon offers no data regarding cable provider penetration for telephony services in the mass market on a wire-center-by-wire-center basis. Yet Verizon brazenly quotes back select phrases from the Commission's concluding paragraph in the *Omaha Forbearance Order* regarding the sufficiency of cable-based competition to justify forbearance in certain wire centers, inserting Verizon's name instead of Qwest's.[97] Based on the record Verizon has assembled, its attempt to rely on the Commission's language regarding cable-based telephony competition must fall on deaf ears. Given the primary role assigned cable-based competition in Verizon's Petitions with reference to the mass market, the Commission should

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center at issue, the cable providers' franchise areas subsume the entire wire center or, at a minimum, reach a certain percentage of subscribers within each wire center.

96 *See, e.g.*, Verizon Petition – New York, at 7 (including reports of national growth rates for the three cable companies competing in the New York MSA). *See also* Verizon Petition – Philadelphia, at 7; Verizon Petition – Pittsburgh, at 7; Verizon Petition – Providence, at 6-7; Verizon Petition – Virginia Beach, at 7; Verizon Petition – Boston, at 7. Significantly, the cable providers whose national growth rates are cited by Verizon provide service in wide geographic areas well beyond the boundaries of the MSAs for which Verizon seeks forbearance.

97 *See* Verizon Petition – New York, at 8; Verizon Petition – Philadelphia, at 7-8; Verizon Petition – Pittsburgh, at 7-8; Verizon Petition – Providence, at 7; Verizon Petition – Virginia Beach, at 7; Verizon Petition – Boston, at 7-8.

conclude on this basis alone that the section 10(a) standard has not been met and that forbearance is not warranted

b. Enterprise Market

Verizon similarly fails to meet its burden of proof regarding cable-based telephony competition in the enterprise market. Unlike the residential and small business markets, the medium-sized and large businesses that comprise the enterprise market generally require more sophisticated services than traditional voice-grade DS0s, such as DS1 services, fractional DS Is, and other high capacity services. Verizon fails to demonstrate that cable competitors are able – or will be able within a commercially reasonably period of time – to adequately serve such customers with their current cable plant. Verizon also ignores problems inherent to cable-based provision of services to the enterprise market due to a lack of physical proximity, technical inability, or both.[98] To the extent cable companies have deployed some amount of fiber or other infrastructure within the relevant MSAs that can support high-capacity telephony services, they can only serve businesses within close proximity to such infrastructure, an operational reality which cautions against broad conclusions regarding the availability of competitive enterprise services without engaging in a more detailed wire center-specific analysis as required by the Commission. **As** succinctly stated by the NYS Staff

> [C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not 'cabled-up' (i.e. current cable-based services are television rather than voice driven) and larger businesses generally have T-carrier systems for their telecommunications needs . . .[99]

98 Based on industry norms, enterprise customers for standard "off-the-shelf' services expect to receive service within 30 calendar days. The time frame for mass market customers is between 10-14 calendar days.

99 *NYS Stuff White* ***Paper,*** at ***3***1.

As an initial matter, Verizon points to the Commission's analysis in the *Verizon-MCI Merger Order* as support for its claim that there is sufficient actual enterprise market competition in the six MSAs today.'" Verizon's reliance is unfounded. In conducting its merger analysis, the Commission examined competition from a very different standpoint than in the present context. Specifically, the conclusions the Commission reached in the merger context were based principally on the existence of retail competition, without a deeper consideration of whether the retail competition was facilities-based or not. Indeed, when examining the presence of competition in the Verizon-MCI merger proceeding, the Commission relied, in large part, on the continued availability of UNEs, the very items which Verizon now seeks to eliminate."' Moreover, the Commission's conclusions in the *Verizon-MCI Merger Order* were not the result of the type of wire-center-by-wire-center analysis called for in this context.'" Consequently, the Commission's conclusions in the *Verizon-MCZ Merger Order* regarding the state of competition in the relevant markets, whether in general or in particular, are of no comparative value.

Here, Verizon offers no evidence that cable companies are providing extensive facilities-based telephony services to enterprise customers today. Instead, Verizon focuses solely on the presence of the franchised cable networks in each **MSA** as evidence that the cable companies possess "the necessary facilities to provide enterprise services."[103] In each Petition, Verizon aggregates a series of anecdotes from the cable companies regarding their outreach to

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100 *See* Verizon Petition – Boston, at 21-22; Verizon Petition – New York, at 22-24; Verizon Petition – Philadelphia, at 22-24; Verizon Petition – Pittsburgh, at 20-22; Verizon Petition – Providence, at 20-22; Verizon Petition – Virginia Beach, at 20-21.

101 *See Verizon-MCI Merger Order*, ¶ 81 (referring to the Commission's analysis of the wholesale special access market and the availability of UNEs).

102 *See generally id.*, at ¶¶ 56-81

103 *See* Verizon Petition – Boston, at 18; Verizon Petition – New York, at 19; Verizon Petition – Philadelphia, at 20; Verizon Petition – Pittsburgh, at 18; Verizon Petition – Providence, at 18; Verizon Petition – Virginia Beach, at 19.

the business marketplace. Notably, cable companies have for some time provided telephony services to business customers, often under their name, but frequently using a separate network or leased facilities. In either case, the facilities are *not* part of the company's franchised cable system. For instance, Cablevision's Optimum Lightpath network, as explained on the company's website, "supports speeds ranging from 10 Mbits/sec to 10 Gbits/sec, delivered via fiber-optic connections that run directly to businesses' locations"[104] Other industry observers note that "[c]able operators are delivering commercial services using ***a range*** of ***technologies,*** including optical Ethernet and TDM links, DOCSIS cable modem connections, Ethernet over coax and last-mile wireless solutions."[105] It is virtually impossible to sort out from the snippets Verizon has assembled the extent to which the enterprise-level telephony services in question are bring provided over franchised cable facilities versus unrelated fiber facilities owned by the cable companies or leased from other providers. Verizon has sought to imply that cable companies' locally-franchised networks are equivalent to the area in which they can provide enterprise-level telephony services. Drawing such a conclusion would be erroneous and is not justified.[106]

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104 *See* http://www.optimumlightpath.com/Interior33-3.html. This site makes clear that this network bears no particular relationship to the company's franchised cable system. ***See also*** Peter Grant, 'Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf," Wall Street Journal, Jan. 17, 2007, pp. **A1, A17** (specifying that Cablevision's Lightpath subsidiary sells services to business customers "over a separate network.").

105 Cox Business, Cable Gets Down to Building Business, March **31, 2005,** posted at http://www.coxbusiness.com/pressroom/recentmedia/03-31-05-bs.html (emphasis added).

106 In the ***Anchorage Forbearance Order,*** the Commission noted that GCI served sophisticated business customers' telephony needs using a fiber optic network separate from its cable network, and the Commission noted that GCI's fiber optic network "is not deployed as ubiquitously as its cable plant." ***Anchorage Forbearance Order,*** n. **121.** Thus, the Commission cannot rely on the apparent extent of a cable provider's cable franchise to determine the potential for the cable provider to provide facilities-based telephony to enterprise customers.

All indications are that cable providers *operating their cable-technology facilities* still do not occupy a meaningful position in the business marketplace, at least one sufficient at this time to support forbearance from section 251(c)(3) unbundling obligations. In the *Triennial Review Remand Order,* the Commission found that cable transmission facilities are not used to serve business customers to any significant degree.[107] More recently, in support of their merger application, AT&T and BellSouth claimed that competition from cable operators for small and medium-sized businesses may only become prevalent toward the end of this decade.[108] In November 2006, when reporting on the state of the cable industry, UBS focused solely on results among residential consumers (*i.e.*, households), declining to mention any business services.[109] It may be that some cable providers recently have announced plans to expand their focus on business services or have begun to make modest inroads with very small businesses, but it is difficult (and highly speculative) to anticipate the degree to which they will be successful in the near-term, despite their boasts regarding availability and speed of delivery. Thus, suggestions by Verizon in its Petitions that cable operators provide significant facilities-based competition in the enterprise market remain more fantasy than reality, and a contrary conclusion is not merited on the basis of the string of selected quotes by Verizon taken from marketing materials on the cable operators' websites.

To the extent that cable companies intend to rely on their traditional cable systems rather than other modes of delivery to provide telephony to enterprise customers, cable system

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107 *Triennial Review Remand Order,* ¶ 193.

108 *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No, 06-74, at 81.

109 UBS Investment Research, Wireline Postgame Analysis 14.0, Recap of Third Quarter 2006 Results. 22 November 2006, at 6, 35.

technology still faces serious technical and operational hurdles before it can be used to provide enterprise level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems."" While CableLabs, the recognized standards body for the cable industry, issued specifications in May 2006 to address the timing/clocking problems in part, full commercial deployment is expected no sooner than mid-2008.[111] In order to provide enterprise-level telephony services, even if the timing/clocking problems are solved, cable systems must make significant upgrades to their network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of enterprise-level services they can accommodate.[112]

There is no evidence offered in the Petitions which shows that cable systems are currently capable of offering significant levels of facilities-based telephony services to enterprise customers in any of the relevant MSAs, let alone the wire centers which form the relevant geographic markets. Indeed, shortly after Verizon filed its Petitions, Credit Suisse noted that the country's largest cable operator, Comcast (a relevant cable operator in the Boston, New York,

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110 ***See,*** *e.g.,* Letter from John Nakahata, Counsel for General Communication Inc. ("GCI"), to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (Nov. 14,2006). at 9 (*"GCI Nov. 14 Ex Parte");* Comments of GCI on ACS of Anchorage, Inc. Forbearance Petition, WC Docket No. 05-281, (Aug. 11,2006). at 14-15, 17.

111 *Id.*

112 The Commission acknowledged these issues in the *Anchorage Forbearance* ***Order,*** referencing GCI's statements that "it will need to undertake a 'large-scale upgrade of its network capacity before it can provide all business customers with DSI services over its [cable] plant."' *Anchorage Forbearance Order,* n. 137.

Philadelphia, Pittsburgh, and Providence MSAs), "is still in the early stages of starting up its commercial telecom business. . . . It's going to take some time to develop business plans, establish operations (e.g., product development, customer support, field operations, and sales), and to then ramp up the business throughout Comcast's footprint."[113] Moreover, while cable operators are reportedly venturing into the business arena, they are typically targeting smaller businesses, not large enterprises.[114] As reported last October, "[c]able operators generally avoid the large business, or 'enterprise,' market. Those customers, from regional banks to giant corporations – have complicated demands and locations in multiple cities."[115] And Comcast itself recently projected that cable-supported business services will be a new growth engine for cable operators, but "in 5-plus years."[116]

In short, the provision of competitive facilities-based telephony to enterprise customers using cable technology is several years in the future, at the least. Such competition is not present today, and every indication is that it will not be available in a reasonable timeframe. This is especially true for large business customers.[117] Accordingly, there is not sufficient competition from cable companies in the enterprise market to support forbearance relief in any of the six markets that are the subject of Verizon's Petitions.

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113 Credit Suisse, *More Upside in Comcast: Comcast Report, 8* (Sept. 22,2006).

114 *See* Peter Grant, "Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf," Wall Street Journal, Jan. 17, 2007, at A1, **A17.**

115 John M. Higgins, *Cable's Next Big Thing,* Broadcasting & Cable, Oct. 9, 2006, at 18.

116 *Comcast May Eventually Provide Phone, Broadband, and Video Services Wirelessly,* Communications Daily, Sept. 21, 2006, at 11.

117 Comcast, for example, sees its growth in business focused primarily in the small and medium-sized business sector, which it views as a separate market. *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at p. 10.

2. Competition from Wireless Services

Like competition from cable-based services, any competition Verizon currently experiences from wireless services does not support the forbearance Verizon requests. Indeed. wireless services are not relevant to the present forbearance analysis because, as the Commission recognized in the *Omaha Forbearance Order,* wireless penetration data generally is not available to support a wire-center based analysis. In the *Omaha Forbearance Order,* the Commission found that:

> Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha **MSA,** and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless* and interconnected VoIP services to rationalize forbearance from unbundling obligations.[118]

The Commission made a similar finding in the *Anchorage Forbearance Order,* noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area.[119] The conclusion reached by the Commission in the Omaha and Anchorage forbearance proceedings is equally applicable here, since Verizon has failed to offer any data differing from (or more substantial than) the data provided by the petitioning party in the Omaha or Anchorage dockets.

To the extent wireless competition is considered by the Commission in its forbearance analysis, which it should not be, wireless competition does not come anywhere close to tipping the scales in favor of forbearance. At the outset, Verizon's Petitions offer no evidence, and indeed no discussion whatsoever, regarding wireless service as a competitor in the enterprise

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118 *Omaha Forbearance Order*, ¶ *72* (emphasis supplied).

119 *Anchorage Forbearance Order*, ¶ 29

market. Verizon therefore has absolutely failed to meet its burden of proof in this regard, and further discussion regarding wireless competition in the enterprise market is not necessary.

Verizon does not fare much better when considering wireless competition in the mass market. As an initial matter, wireless service, standing alone, cannot currently he considered a true substitute for wireline service in the mass market. Verizon's overreaching suggestion to the contrary is predicated on a faulty telephony-centric assumption. Today, wireline service gives consumers not only access to other end users for "telephone" calling but also provides access to the Internet, whether through a broadband or dial-up connection. While there are fledgling data services currently available over mobile phones, wireless access today is simply incapable of offering the sort of quality service that customers demand and have come to expect. Currently, these critical features can only be provided by telephone companies or cable providers, a fact which Verizon completely overlooks.

While a small and slowly-increasing percentage of households have become wireless-only for their voice services, the vast majority of those consumers still access the Internet using a wireline connection, which remains an essential component of their communications needs. Indeed, a recent analysis concluded that "Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce chum, rather than the next leg in the company's growth."[120] **As** such, wireless service today cannot substitute completely for wireline access lines – it is merely complementary. This shortcoming is particularly critical in the current context, whcrc the Commission has been asked to forbear from enforcing Verizon's obligation to provide the UNEs required by many wireline service providers. Accordingly, the

[120] *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2

Commission should totally ignore the information proffered by Verizon regarding wireless services, as it did in the Omaha and Anchorage forbearance proceedings.

Even assuming, ***arguendo,*** that wireless service is capable, in theory, of serving as a complete substitute for mass market wireline service today or in a reasonably short time frame, which it is not, Verizon has still failed to meet its burden. In the recent merger proceedings involving SBC and AT&T, and Verizon and MCI, the merger applicants contended that wireless competition provided a material check on any potential competitive abuse resulting from their merger.[121] Verizon, in its Petitions, contends that the Commission in the *Verizon-MCI* ***Merger Order*** embraced mobile wireless carriers as significant participants in the mass market in its operating territory.[122] In reality, the Commission was very guarded in its reliance upon wireless mobile services in any sort of competitive analysis. Indeed, only a small percentage of wireless subscribers, at most, were deemed relevant to the Commission's evaluation. Specifically, the Commission concluded that mobile wireless services should be included within the product market for local services only with respect to the 6% of customers who rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service.[123]

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121 ***See*** Joint Opposition of SBC Communications Inc. and AT&T Corp. to Petitions to Deny and Reply Comments, WC Docket No. 05-65, at 98-101 (filed May 10,2005); Joint Submission of Verizon Communications Inc. and MCI, Inc., Mass Market White Paper, WC Docket No. 05-75, at 34-47 (filed Sept. 1,2005). See *also* Letter from Christopher Heimann, SBC Communications Inc. and Lawrence J. Lafaro, AT&T Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, at 2 (filed Jul. 12,2005) (noting technological advances and marketplace developments are causing a decline in traditional wireline services).

122 ***See*** Verizon Petition – New York, at 8-10; Verizon Petition – Philadelphia, at 8-9; Verizon Petition – Pittsburgh, at 8-9; Verizon Petition – Providence, at 7-9; Verizon Petition – Virginia Beach, at 7-9; Verizon Petition – Boston, at 8-9.

123 *Verizon-MCI* ***Merger Order,*** ¶ 91. Moreover, in its merger proceeding involving Verizon and MCI, the New York Department of Public Service Staff noted that evidence that consumers view wireless as a substitute for traditional wireline service is mixed. ***See*** *NYS Stuff* ***White Paper***, at 23.

Here, where the Commission is being asked to consider forbearance from statutory unbundling requirements in the mass market,[124] there are even less compelling reasons to include wireless service in the competitive analysis. Verizon has offered no concrete evidence that wireless service has become accepted as a "complete substitute" for wireline service in a material way. That is because it is not. Verizon does not offer any data regarding complete wireless substitution on a wire center or even an MSA-wide basis,[125] rendering obsolete the Commission's findings that only about 6% of households have chosen to rely on wireless services for all of their communications needs. While intermodal competition between wireline and mobile wireless services likely will increase in the future, wireless services do not yet enjoy the ubiquity or the service quality to qualify as a suitable substitute for wireline service offerings.[126]

While Verizon offers *nationwide* projections about the number of residential wireless subscribers that may, in several years, select mobile services as their only residential service, these predictions extend far enough into the future (*e.g.*, 2010) that there is no basis to conclude that as of today (or by the date required for action by the Commission on the Petitions), wireless service is or will he generally available in a reasonable time frame as a complete substitute for mass market services. Verizon also makes broad *statewide* assertions, contending, for example, that in New York State there are more wireless subscribers than access lines served

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124 **As** explained above, Verizon does not even proffer wireless competition as a basis for forbearance in the enterprise market.

125 Verizon Petition – New York, at 8-10; Verizon Petition – Philadelphia, at 8-9; Verizon Petition – Pittsburgh, at 8-9; Verizon Petition – Providence, at 7-9; Verizon Petition – Virginia Beach, at 7-9; Verizon Petition – Boston, at 8-9.

126 *See, e.g., Triennial Review Order*, ¶ 445.

by ILECs or CLECs.[127] Not only is this data insufficiently specific, it provides no information about the extent to which wireless service is a complete substitute for wireline service Moreover, this assertion fails to address the fact that in a single residential household, which may have one wireline access line, there are typically multiple mobile phones, each having its own telephone number. Accordingly, any comparison of wireless phones in use and wireline access lines is likely to significantly overstate the case in wireless's favor.

Also significantly, Verizon offers no data at all regarding the number of small business users that have abandoned their wireline phone in favor of wireless services, and so therefore completely ignores this important component of the mass market. Because Verizon makes its case regarding the mass market's use of wireless alternatives based solely on residential wireless use, should the Commission consider wireless usage in the mass market in its forbearance analysis, which it should not, it should require Verizon to put forth its evidence regarding wireless substitutability among small business users in each wire center and bifurcate the mass market and address small businesses and residential subscribers as separate markets for all purposes.[128]

At bottom, however, since the focus of Verizon's request for forbearance from section 251(c)(3) unbundling requirements comes down to a wire center-specific analysis, the question is whether Verizon has offered wireless data that "allows the Commission to refine its

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127 *See* Verizon Petition – New York, at 11-12. ***see*** *also* Verizon Petition – Philadelphia, at 8; Verizon Petition – Pittsburgh, at 8; Verizon Petition – Providence, at 8; Verizon Petition – Virginia Beach, at 8; Verizon Petition – Boston, at 8.

128 The Commenters believe that residential and small business customers constitute separate markets. It is particularly appropriate to treat small business customers as a separate market since they are increasingly purchasing larger bandwidth circuits that are symmetric and have guaranteed service levels to meet their data requirements.

analysis."[129] Verizon has not. Taking the New York MSA as an example,[130] Verizon refers to the presence of wireless carriers within the MSA, and can only assert that "competitive service from at least one of these carriers is available throughout the New York MSA."[131]

In sum, wireless service, because of its inherent limitations, simply cannot substitute for wireline service today. At best, it remains a complement to wireline services. Verizon has failed to provide any concrete data that suggests otherwise. Moreover, Verizon has provided inadequate information to permit the Commission to take wireless competition into account in conducting its wire center-based forbearance analysis.

3. Competition from Over-the-Top VoIP Providers

In addition to cable and wireless services, Verizon points to over-the-top VoIP services ("O/VoIP") in its attempt to demonstrate sufficient competition to warrant forbearance in the mass market.[132] These services arc simply not a source of facilities-based competition, however, because, by definition, they ride the facilities of another provider, which in many cases

129 *See Omaha Forbearance Order*, ¶ 72.

130 Verizon also fails in its other five Petitions to provide wire center-specific data regarding wireless services that would allow the Commission to refine its analysis. The New York petition is used for illustrative purposes, but the points made regarding Verizon's presentation of competition from wireless services herein are applicable to all six Petitions.

131 Verizon Petition – New York, at 10. *See also* Verizon Petition – Philadelphia, at 10; Verizon Petition – Pittsburgh, at 10; Verizon Petition – Providence, at 10; Verizon Petition – Virginia Beach, at 10; Verizon Petition – Boston, at 10.

132 *See, e.g.,* Verizon Petition - New York, at 12-14. *See also* Verizon Petition – Philadelphia, at 12-14; Verizon Petition – Pittsburgh, at 12-14; Verizon Petition – Providence, at 12-13; Verizon Petition – Virginia Beach, at 12-13; Verizon Petition – Boston, at 12-14. As with wireless services, Verizon docs not rely on O/VoIP services to demonstrate competition in the enterprise market. While a number of carriers are beginning to integrate VoIP into their overall package of business services, these offerings are typically facilities-based and part of the larger service bundle demanded by business customers which stand-alone VoIP providers simply cannot match. Moreover, integration of such IP-enabled capabilities into a larger suite of business services is needed to meet the complex and diverse needs of an increasing number of small and medium-sized businesses in addition to enterprise business customers to ensure that they receive the quality of service they demand.

is likely to be Verizon itself.[133] As Verizon notes, an "underlying broadband connection [is] needed for VoIP service" and O/VoIP providers "do not operate their own loop and transport networks."[134]

Verizon's claim that O/VoIP providers still should be considered as a source of competitive discipline on Verizon is baseless. In essence, because O/VoIP providers either use transport and loops provided by Verizon itself, other LECs, or cable companies, Verizon has accounted for these lines somewhere else in its Petition. In short, to include VoIP in the analysis would be double-counting. Moreover, as pointed out by the Virginia State Corporation Commission ("VCC"),[135] granting Verizon forbearance from section 251(c)(3) unbundling obligations would restrict the ability of carriers that rely on copper loops obtained from Verizon to offer broadband services to their customers from participating in the broadband market.

Further, Verizon has provided no indication of the extent to which O/VoIP services are being provided over Verizon's facilities versus the facilities of other facilities-based

133 Indeed, Verizon is enjoying the benefits of the growth occurring in the high-speed Internet access market. The Commission's most recent report cites 26% nationwide growth in high-speed lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in at least one direction) and 15% growth in advanced services lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in both directions) during the first half of 2006. *High* ***Speed Services for Internet Access:*** *Status as* ***of June*** 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at 2-3 (Jan. 2007). The same report shows that from December 2005 to June 2006, high-speed lines increased by approximately 1.2 million (from 3.66 million to 4.85 million) in New York State, by over 380,000 (from 1.43 million to 1.81 million) in Massachusetts, by more than 650,000 (from 1.99 million to 2.64 million) in Pennsylvania, by 25,249 (from 132,399 to 157,648) in Delaware, and by more than 420,000 (from 1.36 million to 1.78 million) in Virginia. ***Id.,*** Table 10. The report shows that ADSL lines are growing significantly faster than cable modem lines, and that the vast majority of ADSL lines are provided by Verizon and other Regional Bell Operating Companies ("RBOCs").

134 ***See,*** *e.g.,* Verizon Petition – New York, at 13.

135 ***See*** Comments of the Virginia State Corporation Commission, WC Docket No. 06-172, p. 7-8 (filed Dec. 15, 2006) ("*VCC* ***Comments").***